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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION

In The Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information And Other Customer Information	)	

PETITION FOR RECONSIDERATION

LCI INTERNATIONAL TELECOM CORP.

Douglas W. Kinkoph
J. Scott Nicholls
LCI INTERNATIONAL TELECOM CORP.
8180 Greensboro Drive, Suite 800
McLean, VA 22102
(703) 848-4476

Brad E. Mutschelknaus
Steven A. Augustino
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, DC 20036
(202) 955-9600

Its Attorneys

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SUMMARY

The CPNI rules adopted in the *Second Report and Order* ("Second Report") both overly burden non-ILEC carriers and fail to adequately protect competitive concerns raised by the ILECs' use of CPNI.

The *Second Report* overly burdens competitive carriers in two ways. First, it excessively regulates the internal procedures of competitive carriers. LCI urges the Commission to rebalance its CPNI rules to eliminate the unnecessary system modifications and "audit trail" requirements imposed on competitive carriers. The Commission's intrusion on competitive carrier internal system design and operation is unprecedented and wholly unnecessary. The Commission can achieve the same level of compliance by giving competitive carriers clear rules regarding the permissible and impermissible uses of CPNI and allowing them the flexibility to implement procedures and/or systems to ensure compliance. In addition, carriers should be given 18 months to implement any necessary system modifications, rather than the mere 8 months provided in the rules.

Second, the rules deprive customers of competitive carriers advantageous joint marketing of non-telecommunications services, such as equipment or information services, that are within the existing service arrangement with the carrier. Related equipment or information services are services "used in the provision of" the telecommunications services to which the customer subscribes. Therefore, a competitive carrier should be permitted to use CPNI to market such non-telecommunications services without first obtaining customer consent.

Regarding competitive concerns, the *Second Report* erroneously adopts a "one size fits all" approach to CPNI, despite the Commission's own recognition that ILEC CPNI is far more valuable and far more susceptible to misuse than is the CPNI of other carriers. Though

providing a verbal nod to competitive concerns associated with ILEC CPNI, the Commission utterly fails to tailor its rules to address these differential concerns.

Finally, the Commission also should reverse the Common Carrier Bureau's recent decision to permit BOCs to continue to rely on outdated authorizations obtained under the very different *Computer III* CPNI rules. Prior "authorizations" received under the *Computer III* regime are insufficient to satisfy Section 222's informed consent standards, and in any event were granted under rules that precluded certain marketing practices permitted under Section 222. Accordingly, there is no reason to assume that customers granting consent under the prior rules would grant consent to use CPNI under present circumstances. The BOCs should not be permitted to obtain consent to use CPNI under rules less stringent than those under which unaffiliated carriers operate.

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PETITION FOR RECONSIDERATION

LCI International Telecom Corp. ("LCI"), by its attorneys, respectfully petitions the Commission for reconsideration of certain aspects of its *Second Report and Order* in the above captioned docket.[1] The Commission's CPNI rules are among the most burdensome and disruptive requirements imposed pursuant to the Telecommunications Act of 1996. The new rules far exceed the customer privacy protections embodied in Section 222, imposing unnecessary burdens on competitive carriers and depriving customers of valuable marketing information and pro-competitive packages and services. At the same time, the Commission ignored the competitive implications of ILEC CPNI, and has failed to ensure that competitive carriers are not placed at a disadvantage by unfair uses of the ILEC's monopoly-generated CPNI. As a result, the rules are both too harsh and too lenient.

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[1] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Second Report and Order and Further Notice of Proposed Rulemaking, FCC 98-27 (rel. Feb. 26, 1998) (*Second Report and Order*). Notice of the *Second Report and Order* appeared in the *Federal Register* on April 24, 1998.

As explained more fully below, LCI urges the Commission to correct these errors by (1) allowing competitive carriers greater flexibility and time to develop systems modifications to protect against unauthorized use of CPNI, (2) bring CPE and information services within the total service relationship for competitive carriers, and (3) implement targeted regulations to deal with the greater dangers of anticompetitive use of CPNI by ILECs. Additionally, the Commission should correct an erroneous interpretation by the Common Carrier Bureau allowing BOCs to rely on CPNI authorizations obtained under the *Computer III* regime.

I. THE COMPUTER SYSTEMS MODIFICATIONS IMPOSE SEVERE NEW REGULATORY BURDENS AND ASSUME SYSTEMS NOT COMMONLY POSSESSED BY COMPETITIVE CARRIERS

The level of micromanagement of competitive carriers' internal information systems mandated by the new rules is unprecedented. Moreover, that the Commission was even considering imposing detailed and costly internal system modifications was not adequately noticed in the Notice of Proposed Rulemaking in this docket.[2] In the *NPRM*, the Commission expressly concluded precisely the opposite, namely, "that [it] should not now specify [computer system] safeguard requirements for all other telecommunications carriers."[3]

Yet from this fleeting renunciation of regulatory intent, the *Second Report* elevates compliance with CPNI protection above all other statutory requirements and expands its regulatory oversight far into the minutia of a competitive carrier's activities to require overhaul of practically every internal system used by a competitive carrier. The Commission's rules

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2 *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115, 11 FCC Rcd 12513 (1996) ("*NPRM*").

3 *NPRM* at ¶ 36.

require carriers never before subject to CPNI rules to "flag" customer service records containing CPNI and "conspicuously display" the CPNI indicator "within a box or comment field within the first few lines of the first computer screen" produced by the system.[4] Carriers also are required to develop an "electronic audit mechanism that tracks access to customer accounts."[5] The "audit mechanism" must record "whenever customer records are opened, by whom, and for what purpose," and this information must be stored by the carrier for at least one year.[6] Furthermore, the Commission mandates employee training, disciplinary policies, and supervisory review for any use of CPNI in outbound marketing programs.[7]

At least in the case of LCI, and LCI believes in the case of nearly all competitive carriers, these requirements impose significant new burdens upon its internal business practices. Virtually every internal system used by LCI could contain customer-specific information subject to the CPNI rules. Modification of each of these systems to track employee access and to record the information required by the *Second Report* is a massive project that likely would cost millions of dollars and divert attention from other, more pressing endeavors, such as ensuring proper deployment of ILEC OSS systems and developing efficient methods of combining unbundled network Further, LCI seriously doubts that it will be able to implement all of these changes within the brief eight month transition period provided by the *Second Report.*

Not surprisingly given the scant mention provided in the *NPRM*, the Commission did not have before it any evidence of competitive carriers' capabilities to implement such extensive

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4 *Second Report*, ¶ 198.

5 *Id.*, ¶ 199.

6 *Id.*

7 *Id.*, ¶¶ 198-200.

internal systems changes. For example, contrary to the Commission's conclusion in paragraph 198 of the *Second Report*, LCI presently does not identify and track CPNI in its computer systems and it cannot "readily implement" such a change.[8] Instead, implementation would require that each of its internal data systems be modified to (1) "flag" that information which relates to the quantity, technical configuration, type, destination or amount of use of LCI's services, (2) identify the category or class of service(s) (*e.g.*, interexchange, local, or wireless) to which the customer subscribes, (3) record whether a customer has granted authorization to use CPNI, (4) note any partial or conditional authorizations given, (5) update the consent information when a customer changes or revokes authorization, and (6) revise the screen appearance to "conspicuously display[] [the CPNI flag] within a box or comment field within the first few lines of the first computer screen." These modifications will require significant time and effort to integrate into each of the customer systems used by LCI. Given the broad scope of the modifications required by the rules, LCI is still in the process of developing specifications for the necessary changes, and is not able at this time to adequately estimate the cost to implement the changes. However, it is apparent that the cost will reach into the many millions of dollars.

Similarly, LCI does not have an electronic audit mechanism in place for CPNI access. Contrary to the Commission's assumption, LCI does not have an automated process to generate records of when employees access customer records for other business purposes.[9] Presently, LCI makes notations of customer contacts for customer service and billing inquiry purposes, but these notations generally do not identify whether any CPNI was accessed. Absent the CPNI obligation, LCI does not have a need to identify when a customer record was opened, by whom,

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8 *Id.*, ¶ 198.

9 *Id.*, ¶ 199.

and the purpose for which it was opened.[10] Meeting these requirements likely would entail prompting every user of the system to identify the nature of the information requested and the "purpose" for accessing the information each and every time that customer-specific information is presented to the employee. Such a procedure would severely harm LCI's ability to serve its customers' needs and likely would greatly inconvenience customers calling into LCI's customer service or billing inquiry centers and increase the time necessary to respond to their questions.[11]

The Commission's sole factual basis for concluding that these requirements will not burden carriers such as LCI are *ex parte* presentations submitted well outside the Commission's published filing schedule by AT&T and several BOCs, carriers that (unlike LCI) have been subject to the FCC's CPNI rules for years.[12] Both AT&T and the BOCs already have systems in place to identify and regulate access to CPNI. Presumably, modification of those systems to conform to the new requirements would be a relatively simple matter. However, AT&T and the BOCs' abilities provide no insight into the burdens on LCI and other competitive carriers to implement what are to them entirely new systems. Indeed, given the historical regulations under which those carriers operated, it seems entirely unlikely that competitive carriers – who have generally been subjects of deregulation by the Commission – would have systems in place that mirror those developed by AT&T or the BOCs.

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10 LCI employees are granted access privileges to the various systems containing customer record information on an as-needed basis. Such access to the systems require use of a system password. However, LCI does not keep records of which employees accessed which systems at any particular time.

11 In all likelihood, customer service representatives would have to be prompted each time they access a customer account to input the purpose for accessing the information. This will lengthen the time during which a customer is on the phone with LCI and degrade the quality of customer service LCI offers.

12 *Second Report*, ¶ 198 n.689, & ¶ 199 n.692.

Moreover, micromanagement in this manner is entirely unnecessary. If given clear rules regarding permissible uses of CPNI, competitive carriers could ensure protection for CPNI through less burdensome methods. For example, a competitive carrier might choose to establish a "CPNI team" to review all prospective marketing campaigns to ensure compliance and choose to seek customer approval pursuant to Section 222(d)(3) for any use of customer information during inbound calls. If such an option were chosen, a carrier would have no need for the expensive internal computer system flagging and auditing mandated by the *Second Report*. Alternatively, in LCI's case at least, if given flexibility in how to modify its computer systems, LCI may develop less burdensome means of prompting its employees when to request CPNI consent or when to limit a certain marketing campaign.[13]

Thus, the Commission should reconsider imposing these mammoth and costly system upgrades, and allow competitive carriers the flexibility instead to implement plans to comply with clear CPNI usage rules. Carriers should be given at least 18 months to implement any systems modifications necessary to comply with the new rules. If the Commission nevertheless wants to continue its regulatory approach to compliance by competitive carriers, it should issue an additional Notice of Proposed Rulemaking to gather specific evidence of the costs and benefits of such systems modifications as applied to competitive carriers before imposing any detailed compliance obligations upon such carriers.[14]

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13 For example, LCI might choose a query system, rather than a "flag" system, to allow an employee to ascertain CPNI status before beginning a customer-specific marketing message.

14 Where the Commission already has evidence of the BOCs' abilities to implement the required safeguards, and such safeguards are justified by the increased competitive risks

II. CPE AND INFORMATION SERVICES RELATED TO THE TELECOMMUNICATIONS SERVICES TO WHICH THE CUSTOMER ALREADY SUBSCRIBES SHOULD BE BROUGHT WITHIN THE TOTAL SERVICE APPROACH FOR COMPETITIVE CARRIERS

Under the "total service approach" adopted by the Commission, carriers may use CPNI without approval to market or provision any telecommunications service within the scope of the existing customer-carrier relationship.[15] The Commission explained that customers expect a carrier to offer them new service plans or additional services within the same category of service to which the customer subscribed and therefore customers give implied consent to such use.[16] With respect to related non-telecommunications services, such as customer premises equipment ("CPE") and information services, the Commission concluded that carriers must receive affirmative approval to use CPNI to market these services, regardless of the scope of the customer's telecommunications relationship with the carrier.[17] This rule is a step backward for competitive carriers, and deprives consumers of the benefits of seamless telecommunications and related services. On reconsideration, the Commission should reverse this rule as it applies to competitive carriers and permit such carriers to count as within the "total service relationship" CPE or information services that are related to the underlying telecommunications services to which a customer subscribes. Such a rule will bring the benefits of competition to consumers while maintaining customer control over the use of CPNI outside the context of his or her existing relationship with the carrier.

(...continued)
associated with ILEC use, the *Second Report's* system upgrade rules should remain in place.

15 *Second Report*, ¶ 56.

16 *Id.*, ¶ 59.

17 *Id.*, ¶ 71.

The seamless marketing of telecommunications services and related CPE or information services is beneficial to consumers. As the *Second Report* concludes, customers expect their carriers to offer them telecommunications services or pricing plans that are within the scope of their existing relationship with the carrier.[18] Section 222(c)(1)(A)'s authorization to use CPNI in connection with the "provision" of the telecommunications service from which it is derived encompasses a customer's implied approval to use CPNI for purposes of offering other telecommunications services within the scope of the existing service relationship.[19]

The Commission acknowledges that the same is true for *non*-telecommunications services related to the telecommunications services to which the customer subscribes. Section 222(c)(1)(B) – which applies to "services necessary to, or used in, the provision" of a telecommunications service – "reflect[s] the understanding that, through subscription of service, a customer impliedly approves its carrier's use of CPNI *for purposes within the scope of the service relationship.*"[20] Whereas Section 222(c)(1)(A) authorizes use in connection with telecommunications services to which the customer subscribes, Section 222(c)(1)(B) authorizes such use in connection with related non-telecommunications services.

However, the *Second Report* concludes that CPE and information services do not fall within the implied approval regarding non-telecommunications services. With regard to services provided by non-dominant competitive carriers, the Commission's conclusion erroneously construes the nature of the carrier-customer relationship and the language of Section 222(c)(1)(B).

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18 *Second Report*, ¶ 32.

19 *Id.*

20 *Id.*, ¶ 134 (emphasis added).

For many years prior to the *Second Report*, carriers have marketed related equipment and information services in conjunction with telecommunications services to which the customer subscribes. For example, LCI and other competitive carriers frequently used customer information to identify those subscribers that could most benefit from the voicemail and voice messaging services the carrier offered. Customers with special needs were marketed all sorts of equipment related to their services, from data modems to speed dialers to special handsets and telephones by their non-dominant carrier providers. More recently, equipment necessary to the provision of frame relay or other advanced data services has been marketed to customers, using telecommunications usage CPNI.

These activities by competitive carriers provide the consumer with significant benefits, without any loss of privacy or customer control. CPE and information services used by or useful to the customer's existing telecommunications services are "within the scope of the service relationship" with that customer. The use of CPNI to market these services does not change the nature of the common carrier relationship with the customer, nor does it expand the scope of the communications services offered by the carrier. After marketing CPE or information services to a customer, the carrier has the same ability to use CPNI to market telecommunications services outside the traditional categories provided by the carrier as it did prior to the marketing. In short, marketing of CPE or information services by a competitive carrier will not lead to the cross-marketing of other telecommunications services without the customer's consent.

Although the Commission acknowledged that Section 222(c)(1)(B) reflects implied authority to use CPNI in connection with non-telecommunications services, it erroneously excluded CPE and information services from the scope of the authorization when service is provided by competitive carriers. The Commission's conclusion rests on a statutory interpretation of services "necessary to, or used in, the provision of" a telecommunications service to require that a service be absolutely essential to the telecommunications service provided by the competitive carrier. This interpretation is not necessary to balance privacy and competitive concerns in the case of non-dominant carriers. Rather, in the case of non-dominant carriers, the Commission should interpret the phrase "necessary to, or used in, the provision" of a telecommunications service as encompassing all services related to, and useful in connection with, the use of telecommunications services to which the customer already subscribes.

Such a reading is consistent with the statute's use of the disjunctive term "or" in the phrase "necessary to, or used in, the provision of" telecommunications service. To fall within this exception to the approval requirement, a non-telecommunications service must either be "necessary to" *or* "used in" the provision of the telecommunications service. Thus, a service may fall within the exception for services "used in" the provision of telecommunications even if it is not absolutely necessary in connection with the provision of a telecommunications service is not required. Rather, if a service (such as voicemail) is capable of being used in connection with the telecommunications service to which a customer subscribes, that service may be "used in . . . the provision" of the telecommunications service. Accordingly, there is no reason to prohibit competitive carriers from using CPNI to provide related equipment or information services to the customer.

In fact, related CPE and information services are like inside wire maintenance and adjunct to basic services – two related offerings for which the *Second Report* permits CPNI use. CPE and information services, like adjunct to basic services, are optional aspects of the service relationship. The products are helpful to the full benefit of the telecommunications services, but are not required in order to use the services. Further, like maintenance of inside wire, CPE and information services are available from a number of unaffiliated providers and are not required to be obtained from the telecommunications carrier. Though the customer may find it beneficial to obtain the service from his or her telecommunications carrier, it is "useful" but not "necessary" to do so. Given these similarities, it is reasonable to conclude that customers expect their competitive carrier providers to offer related services such as these to them, and therefore impliedly consent to such use pursuant to Section 222(c)(1)(B).

III. THE COMMISSION IGNORED COMPETITIVE CONCERNS RAISED BY USE OF ILEC CPNI

Fundamental to the *Second Report and Order* is the Commission's conclusion that "Congress established a comprehensive new framework … which balances principles of privacy and competition with the use and disclosure of CPNI and other customer information.[21] While it is true that "privacy is a concern which applies regardless of carrier size,"[22] the same conclusion does not apply to competitive concerns. Regarding competitive concerns, ILECs "have more potential for competitive abuse of CPNI because of their large customer base,"[23] however, the Commission's rules fail to address this distinction. On reconsideration, in addition to merely recognizing the competitive concerns posed by the ILECs, the Commission should establish affirmative rules that limit the ILECs' ability to misuse CPNI to anticompetitive ends.

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21 *Second Report and Order,* ¶ 14.

22 *Id.*

23 *Id,* ¶ 193.

A. ILEC CPNI is different in kind from the CPNI possessed by competitors

ILECs have unmatched access to the CPNI of all customers, which creates unmatched potential for abuse. Each ILEC possesses CPNI of essentially every single customer in the ILEC's service territory. Through maintaining presubscription databases, which are used to identify each local exchange customer's long distance provider, ILECs have a rich source of interexchange service CPNI. Through virtual monopoly control of retail markets, ILECs possess expansive databases of local exchange CPNI. Through monopoly control of bottleneck facilities, such as loops and other unbundled network elements, ILECs have access to a vast array of CPNI on the customers that ILECs have lost to retail competition. In sum, ILECs possess unequalled databases of CPNI, which makes the CPNI within the ILECs control different in kind than the CPNI possessed by competitors.

The *Second Report and Order* recognizes that competitive considerations continue to support regulation of CPNI.[24] Moreover, the Commission has stated that it is "cognizant of the danger[] … that incumbent LECs could use CPNI anticompetitively."[25] Thus, even the *Second Report* itself does not dispute that ILEC CPNI is different from all other carriers' CPNI.

In spite of this recognized danger, the rules offer no countervailing safeguards. Instead, the Commission asserts that the greater potential for abuse of ILEC CPNI may be "addressed more effectively by applying our new CPNI scheme to all carriers."[26] However, the Commission

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24 *Second Report and Order*, ¶ 182 n. 636 ("we disagree with parties to the extent they argue that competitive considerations no longer justify certain protective CPNI requirements").

25 *Id.*, ¶ 59.

26 *Id.*, ¶ 193.

utterly fails to explain how applying CPNI rules to *non-ILECs* can in any way affect the greater potential for abuse by ILECs of their own CPNI. In fact, this point is simply inexplicable. No matter what CPNI rules are in place for non-ILEC carriers, the fact remains that ILECs "may have more potential for anticompetitive use of CPNI because of their large customer base."[27] Rational decision making requires that the Commission tailor its rules to the harm identified, namely the greater potential for anticompetitive use of CPNI by ILECs. Having acknowledged the presence of the increased danger, the Commission may not rely on generally applicable rules to address it. It can and must adopt additional rules, targeted specifically at ILECs, to reduce the danger that they will use their ubiquitous CPNI resources to thwart the development of competition in local services and to gain an anticompetitive advantage in the provision of long distance and other telecommunications services outside their traditional "local" service category.

B. The Commission should adopt bright-line rules to protect CPNI from ILEC abuse

The Commission must address these anticompetitive concerns directly and meaningfully. Specifically, the Commission should adopt regulations that: (i) prohibit dominant carriers from sharing CPNI with non-dominant affiliates unless a customer consents in writing; (ii) restrict ILEC use of CPNI outside the total service relationship unless the customer provides written consent; and (iii) for a period of five years, require ILECs to provide more frequent notification of CPNI rights.

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27 *Id.*

First, the Commission should preclude dominant ILECs from sharing CPNI with non-dominant affiliates, unless written customer consent is obtained. Such a rule would limit the ability of the ILECs to leverage their existing relationships with customers (without customers' knowledge) to benefit new ILEC affiliates in competitive markets. Failure to implement a rule requiring written consent before transferring CPNI from a dominant carrier to a non-dominant affiliate would thwart the customers' ability to control their CPNI and harm competition by giving – at presumably no cost – ILEC affiliates an information advantage over competitors.

Second, the Commission similarly should restrict ILEC use of CPNI to market services outside the existing total service relationship unless the customer provides written consent. Written consent provides the greatest assurance that a customer knowingly has relinquished a right to control the use of its CPNI. Given the fact that customers historically had no legal alternative to the ILECs' local services – and today have no practical alternative – the greater protection provided by written consent is warranted. Again, ILECs have an incredible information advantage over competitors solely as a legacy derived from their deeply entrenched monopoly relationships with customers. Allowing ILECs to exploit this involuntary local exchange relationship with customers without their written consent gives the ILECs a substantial head start on competitors.

Third, the Commission should require ILECs more frequently to notify customers of their CPNI rights during the transition to competitive markets. This notification should be given on at least an annual basis for five years, while local competition is beginning to take hold. Requiring annual notification for five years will impose minimal cost on the ILECs, as ILECs may provide this notification as a billing insert. The notification would benefit consumers by ensuring that any consent to use CPNI during the transition period is fully informed and knowingly given.

Additional notification also is necessary to make consumers aware of their expanded CPNI protection rights under the Act and new competitive alternatives available.

In sum, ILECs possess unequalled databases of CPNI, including competitor CPNI, and benefit from a legacy of government-protected monopoly provision of service. Because of these disparities, the Commission has recognized that, "competitive concerns may justify different regulatory treatment for certain carriers."[28] The Commission should implement the rules outlined herein to protect consumers and to minimize the effect of the ILECs' information advantages that result from their monopoly roots.

There is ample authority in the provisions of Sections 4(i), 201, 251(c), and 303(r) for the Commission to address these concerns beyond the general requirements imposed in Section 222. Sections 4(i), 201(b), and 303(r) of the Act authorize the Commission to adopt any rules it deems necessary or appropriate to carry out its responsibilities under the Act, so long as those rules are not otherwise inconsistent with the Act.[29] Indeed, as the Commission itself noted in the *Second Report and Order*, "[b]ased on the Act's grant of jurisdiction, the Commission has historically regulated the use and protection of CPNI by AT&T, the BOCs, and GTE ...."[30] Thus, the plain terms of the Act and the Commission's well-established authority to promulgate rules governing dominant-carrier use of CPNI indicate that the Commission has the power to implement CPNI rules that apply only to the ILECs.[31]

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28 *Id.*, ¶ 134.

29 *See, e.g., United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-03 (1956).

30 *Second Report and Order*, ¶ 15.

IV. THE COMMISSION SHOULD NOT PERMIT BOCS TO RELY UPON COMPUTER III CPNI AUTHORIZATIONS TO SATISFY SECTION 222'S REQUIREMENTS

Prior to the 1996 Act, the BOCs had to obtain approvals to use CPNI pursuant to rules adopted in the *Computer III* proceeding.[32] Generally, these rules provided for default access to CPNI of residential and single line business customers and required affirmative approval only from multiline business customers. Moreover, the rules provided for notification only to multiline business customers, but did not require specific identification of the uses to which the carrier may place CPNI.

In the *Second Report and Order*, the Commission "replaced" these prior CPNI rules with new rules adopted pursuant to Section 222.[33] By replacing the rules, the Commission by implication invalidates the authorizations the BOCs obtained under the *Computer III* rules. Instead, the BOCs, like all other carriers subject to Section 222, must obtain authorization only pursuant to the methods permitted by the *Second Report and Order*. However, in a clarification order issued only two business days before reconsideration petitions were due, the Common Carrier Bureau concluded that the BOCs may continue to rely on *Computer III* authorizations received from business customers with more than 20 lines.[34] This conclusion is in error and

(...continued)

31 Alternatively, the Commission could reach the same result by interpreting Section 222 to require such rules, but forbear under Section 10(a) from applying these rules to non-ILEC carriers.

32 *Computer III Phase I Order*, 104 FCC 2d 958, ¶ 260.

33 *Second Report and Order*, ¶ 181.

34 *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Order, DA 98-971 (May 21,1998).

should be reversed.[35]

Of course, there should be no dispute that implied authorizations received pursuant to the *Computer III* regime do not satisfy the new rules. Section 222 requires express approval from customers.[36] As the Commission noted, there is no assurance that approval implied from a failure to restrict CPNI is an informed approval.[37] Authorizations received pursuant to "opt-out" or "negative approval" provisions of the *Computer III* rules do not satisfy these new rules and therefore are no longer valid.[38]

Similarly, it is clear that express approvals received from business customers under the old rules also are invalid, at least as applied to uses other than the marketing of CPE and enhanced services. The *Computer III* rules only addressed the marketing of CPE and enhanced services, not the cross-marketing of telecommunications services. Obviously, any approval received pursuant to these rules says nothing about the customer's preferences as they relate to the use of CPNI for other purposes, such as to market services outside the customer's existing relationship with the carrier. The Bureau correctly concluded that, whatever the significance of these prior approvals for CPE and enhanced services, they are not effective for other purposes.[39]

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35 Although the Bureau's order is reviewable by Application for Review filed 30 days after its release, 47 C.F.R. § 1.104, it would be more efficient to address the issue in this reconsideration proceeding along with the other reconsideration issues.

36 *Second Report and Order*, ¶ 94.

37 *Id.*, ¶ 91.

38 Conversely, however, the BOC should continue to honor the requests of any customers that exercised their prior rights to deny the BOC use of CPNI. A customer who returned a CPNI restriction under the *Computer III* "opt-out" rules should be presumed to continue to want to restrict CPNI under the new rules. Of course, nothing would preclude the BOC from seeking to obtain approval from such a customer after presentation of the required disclosures. *See id.*, ¶ 117.

39 *Clarification Order*, ¶ 10.

Nevertheless, the Bureau's decision to allow BOCs to rely on *Computer III* written approvals to market CPE or information services is wrong for two reasons. First, a cornerstone of the new CPNI rules is the requirement that customers must give "informed consent" for carriers to use CPNI outside the existing service relationship and that the consent be "proximate" to the notification of such rights. This protection was not present under the *Computer III* rules, and customers may have consented to CPNI use before, or long after, receiving the disclosure required under the old rules. Accordingly, there is no reason to presume that previous approvals were "informed approvals."

Second, and more fundamentally, business customers were being asked to grant consent in a fundamentally different environment than is present today. There is no assurance that customers who would grant CPNI authority when ILECs were legal monopolies would do the same when additional competitive alternatives are available. Indeed, a business customer very likely could have felt "compelled" in the *Computer III* environment to grant consent, given that no other alternative local suppliers were available. These customers should be given a new opportunity to determine whether or not to grant consent under the environment created by the 1996 Act.

For these reasons, the Commission should make clear that a BOC may not in any instances rely on approvals received under the *Computer III* rules to satisfy Section 222's requirements. BOCs, like all other carriers, must work within the structure of Section 222 to obtain the necessary approvals to use CPNI.

Respectfully submitted,

LCI INTERNATIONAL TELECOM CORP.

By: ______________________

Douglas W. Kinkoph
J. Scott Nicholls
LCI INTERNATIONAL TELECOM CORP.
8180 Greensboro Drive, Suite 800
McLean, VA 22102
(703) 848-4476

Brad E. Mutschelknaus
Steven A. Augustino
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, DC 20036
(202) 955-9600

Its Attorneys

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